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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JESSIE JAMES RAYBURN, Defendant and Appellant.	C080435 (Super. Ct. No. 14F08242)

Defendant Jessie James Rayburn was convicted of vehicle theft, receipt of a stolen vehicle, and delaying a peace officer, with enhancements for a prior strike and a prior prison term. Defendant contends the trial court erred in finding it had suspended criminal proceedings for a determination of defendant's mental competency to stand trial and refusing to hear his motion for new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Defendant also contends the trial court erroneously refused his request for a pinpoint jury instruction on delaying a peace officer. Defendant further contends the abstract of judgment contains errors.

After defendant filed his appeal, the Placer County trial court granted his request under Proposition 47 to designate as a misdemeanor the 2009 conviction that was the basis for the prior prison term enhancement. (Pen. Code, § 1170.18, subd. (g)—hereafter § 1170.18(g).)[1] We granted defendant's request for judicial notice of the Placer County trial court's order and related documents, as well as defendant's request for supplemental briefing on his contention that under *In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*), the 2009 conviction can no longer support the prior prison term enhancement. Because the 2009 offense on which defendant's section 667.5, subdivision (b) (hereafter section 667.5(b)) enhancement is based is no longer a felony and his judgment is not yet final, defendant is entitled to relief under Proposition 47 and the *Estrada* rule. (*People v. Buycks* (2018) 5 Cal.5th 857, 888-890 (*Buycks*).) We shall order the trial court to strike the section 667.5(b) enhancement and correct the errors in the abstract of judgment. We shall otherwise affirm the judgment.

I. BACKGROUND

On December 17, 2014, probation officer Carlo Cottengim, Detective Thomas Lamb, and two other police officers attempted to perform a probation search at defendant's residence. The officers had been notified there was a stolen vehicle in defendant's driveway. When Office Cottengim arrived at defendant's residence, defendant was on the roof, walking back and forth and yelling at the officers. Defendant said he was not on probation, did not "honor [the officers'] authority," and refused to come out.

Defendant eventually left the roof and stood in his open front door behind a locked security gate. Officer Cottengim repeatedly identified himself as a probation officer and asked defendant to exit the residence, but defendant refused. Defendant denied he was

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[1] Undesignated statutory references are to the Penal Code.

Jessie Rayburn, said he needed to see a warrant, and again denied being on probation. The officers approached, but defendant had next to him two "large" "pitbull type" dogs that were growling and acting aggressively. Officer Cottengim successfully subdued the dogs with pepper spray, and Detective Lamb unsuccessfully tried to open the security gate door, breaking the gate's bars in the process. After "several directives," defendant unlocked the security gate door and walked back into the residence. The officers entered and instructed defendant to kneel and turn so they could handcuff him, but defendant actively resisted by pulling away, thrashing about, and throwing his head and shoulders back. Defendant also continued yelling at the officers. After struggling with defendant for 10 to 15 seconds, the officers placed him in handcuffs.

One of the officers advised defendant of his *Miranda*[2] rights, and defendant responded he was a sovereign citizen and did not enter into contracts with the officer's government. Defendant was arrested and placed in a patrol car. One of the officers inspected the suspected stolen vehicle in defendant's driveway and noticed its steering column had been taken apart, which is common in a stolen vehicle. There were wires hanging down and the ignition was hanging out of the steering column. During an interview at the police station, defendant admitted to hot wiring the vehicle.

Defendant was charged with unlawfully taking a motor vehicle (Veh. Code, § 10851, subd. (a)—count one), unlawfully receiving a stolen vehicle (§ 496d, subd. (a)—count two), and unlawfully delaying, resisting, and obstructing Detective Lamb (§ 148, subd. (a)(1)—count three). A prior serious felony conviction and prior prison term were also alleged. (§§ 667, subds. (b)-(i), 667.5(b), & 1170.12.) The prior prison term allegation was based on a conviction in 2009 for possession of a controlled substance. (Health & Saf. Code, § 11350.)

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

After being arraigned on December 19, 2014, defendant was represented by Assistant Public Defender Anna Semerdjian at status conferences on December 23, 2014, and January 8, 2015. During the January 8, 2015, conference, Semerdjian declared a doubt as to defendant's competence to stand trial, per section 1368 et seq. Counsel and the trial court were discussing which doctor to appoint to evaluate defendant when defendant asked, "Can I get a Marsden motion? [¶] . . . [¶] . . . I want a Marsden motion to fire her . . . ." Ignoring defendant's request, the trial court responded criminal proceedings were suspended. Defendant requested the trial court "ask [him] a couple questions to see if [he knew] what's going on," but the trial court appointed a psychologist and concluded proceedings.

At the next hearing on February 5, 2015, defendant was represented by Robert Woodward, a different assistant public defender. Woodward informed the trial court that defendant was competent. Based on the psychologist's report dated February 4, 2015, opining defendant was competent to stand trial, the trial court found defendant competent and reinstated proceedings. Defendant was represented by two other counsel from the public defender's office during the remainder of proceedings, but never again by Semerdjian.

At trial, defense counsel requested the following pinpoint instruction: "Penal Code 148 does not criminalize a person's failure to respond with promptness to orders of peace officers. [¶] *People v. Quiroga* [(1993)] 16 Cal.App.4th 961, 966." The trial court refused, reasoning *Quiroga* was distinguishable because, at the time of the incident at issue here, defendant was on probation with the following condition: "Defendant shall submit his person, property and automobile and any object under Defendant's control to search and seizure in or out of the presence of the Defendant by any law enforcement officer and/or probation officer at any time of the day or night, with or without his consent and without a warrant."

With respect to count three, the trial court instructed the jury as follows: "The [d]efendant is charged in [c]ount [three] with resisting, or obstructing, or delaying a peace officer in the performance or attempted performance of his duties in violation of [section 148, subdivision (a)]. To prove that the [d]efendant is guilty of this crime, the People must prove that, one, Detective Thomas Lamb was a peace officer lawfully performing or attempting to perform his duties as a peace officer. Two, the [d]efendant resisted, or obstructed, or delayed Detective Lamb in the performance or attempted performance of those duties. And three, when the [d]efendant acted, he knew or reasonably should have known that Detective Lamb was a peace [] officer performing or attempting to perform his duties. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. The duties of a peace officer include conducting probation searches and investigating crimes. [¶] The People allege the [d]efendant resisted, or obstructed or delayed Detective Lamb by doing the following: Refusing to open his door to search upon lawful demand and resisting officers when detaining [d]efendant for the search. [¶] You may not find the [d]efendant guilty unless you all agree that the People have proved that the [d]efendant committed at least one of the alleged acts of resisting, or obstructing or delaying a peace officer who was [law]fully performing his duties and you all agree on which act he committed."

The trial court also gave the following instruction at defendant's request: "A person may not interpose any obstacles which in any manner impedes, hinders, interrupts or delays any lawful arrest or search provided, however, mere verbal comments or remarks[,] including verbal challenges, protests and abuse directed at a peace officer[,] cannot form the basis of a violation of [section 148] as such conduct is protected by the First Amendment."

The jury convicted defendant on all counts. In a bifurcated proceeding, a separate jury also found the defendant had a prior strike and a prior prison term.

The trial court sentenced defendant to state prison for two years for count one (doubled for the prior strike), two years for count two (doubled for the prior strike and stayed per section 654), and one year in state prison for the prior prison term. In addition, the trial court sentenced defendant to 364 days in county jail for count three, to be served consecutively.

Defendant filed a timely appeal on October 1, 2015. On October 19, 2015, defendant petitioned the Placer County trial court to reduce his 2009 conviction for possession of a controlled substance to a misdemeanor, pursuant to section 1170.18, subdivisions (f) and (g). The Placer County trial court granted defendant's petition on April 11, 2016.

II. DISCUSSION

A. Marsden Hearing

As the People concede, defendant was entitled to a *Marsden* hearing. "When a defendant seeks substitution of appointed counsel pursuant to [*Marsden*], 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' [Citations.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.) A trial court must conduct a *Marsden* hearing even if it has suspended criminal proceedings to determine a defendant's competency to stand trial. (*Id.* at pp. 600-601; *People v. Stankewitz* (1990) 51 Cal.3d 72, 88.)

Despite defendant's contentions, reversal is not required because defendant has failed to show how the erroneous denial prejudiced him. (*People v. Taylor, supra*, 48 Cal.4th at p. 601.) Defendant achieved the purpose of his motion because Semerdjian was replaced by other counsel from the public defender's office at the next hearing, prior

to the court's determination of defendant's competency to stand trial. (*Ibid*.) In addition, Semerdjian did not represent defendant in any subsequent proceedings.

B. Pinpoint Instruction

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) "The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].' " (*People v. Burney* (2009) 47 Cal.4th 203, 246.) A trial court's erroneous failure to give a pinpoint instruction is reviewed for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Flood* (1998) 18 Cal.4th 470, 490; see also *People v. Earp* (1999) 20 Cal.4th 826, 887.)

Defendant contends the trial court erred by refusing to give his requested jury instruction that section 148, subdivision (a)(1) does not criminalize a failure to respond promptly to the orders of police. He further contends the trial court's error was not harmless because defendant was charged with violating section 148 as to Detective Lamb by "(1) refusing to open his house to search upon lawful demand, and (2) resisting officers when detaining defendant for the search." According to defendant, there was substantial evidence from which the jury could have found he complied with the officers' commands to open the security gate and any delay was lawful because he was merely exercising his First Amendment rights to protest the officers' actions before letting them in, per *People v. Quiroga* (1993) 16 Cal.App.4th 961 (*Quiroga*). Defendant contends his conviction on count three must be reversed per *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] because the record fails to establish the conviction is based solely on the second act identified in the instruction (i.e. resisting officers when detaining defendant for the search). The People disagree, contending *Quiroga* does not apply to a probation search.

In *Quiroga*, the court held there was insufficient evidence of a section 148 violation where the defendant merely protested repeatedly before complying with an officer's orders, because verbal criticism of or challenges to police action are protected by the First Amendment. (*Quiroga*, *supra*, 16 Cal.App.4th at p. 966 [affirming the judgment due to the defendant's repeated refusal to give his name after being arrested].) The law does not "criminalize[] a person's failure to respond with alacrity to police orders." (*Ibid*.) "However, when a person's words go 'beyond verbal criticism, into the realm of interference with [an officer's performance of his or her] duty,' the First Amendment does not preclude criminal punishment." (*In re Chase C.* (2015) 243 Cal.App.4th 107, 117.) For example, the First Amendment does not protect a defendant who uses physical force, impedes an investigation, or lies to officers. (*Id.* at p. 118; see also *People v. Lacefield* (2007) 157 Cal.App.4th 249, 261 disapproved on other grounds in *People v. Smith* (2013) 57 Cal.4th 232, 241; *In re Joe R.* (1970) 12 Cal.App.3d 80, 83-84 [§ 148 violated where the defendant interrupted officer, making it impossible to elicit information he sought from suspects, and hit officer] disapproved on other grounds in *In re Robert G.* (1982) 31 Cal.3d 437, 445; *People v. Christopher* (2006) 137 Cal.App.4th 418, 432 [§ 148 violated where the defendant gave a false name to officers who had taken him into custody]; *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 129-130 [§ 148 violated where the defendant raised his hand to acknowledge officers' orders to back away from patrol car holding his associate but failed to comply].)

We reject defendant's argument that there was substantial evidence that he merely verbally protested before eventually complying with the officers' instructions to open the security gate. In addition to yelling at the officers while he was walking back and forth on the roof, defendant lied about being on probation and repeatedly said he did not "honor [the officers'] authority." When he eventually came down, he stood in the front doorway behind a locked security gate, refused to come out, and kept next to him two "large" "pitbull type dogs" who were "growling and being aggressive." The dogs only

stood down after one of the officers used pepper spray on them. Defendant continued to refuse to open the locked gate, forcing officers to attempt to breach it with such force that the bars of the gate broke off. Defendant finally unlocked it after repeatedly ignoring multiple commands from officers to do so. After the officers entered, defendant struggled with the officers when Detective Lamb tried to handcuff him. Under these circumstances, defendant was not merely exercising his First Amendment rights to protest.

Moreover, the jury was instructed regarding First Amendment protections for searches: "mere verbal comments or remarks, including verbal challenges, protests and abuse directed at a peace officer, cannot form the basis of a violation of [section 148], as such conduct is protected by the First Amendment." (See *People v. Earp, supra*, 20 Cal.4th at p. 887 [no prejudice results under the *Watson* standard when a rejected pinpoint instruction was covered in other instructions given by the court].) On this record, the trial court did not err in refusing to give the requested pinpoint instruction.

C. Proposition 47

Relying on *Estrada* and Proposition 47, defendant contends the prior prison term enhancement in his 2015 sentence must be stricken. We agree.

A prior prison term enhancement requires proof that the defendant " '(1) *was previously convicted of a felony*; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' " (*Buycks, supra*, 5 Cal.5th at p. 889, italics added; *People v. Tenner* (1993) 6 Cal.4th 559, 563, italics added.) As recently explained by our Supreme Court in *Buycks*, after a successful Proposition 47 petition, a defendant's prior felony conviction "becomes 'a misdemeanor for all purposes,' " and it "can no longer be said that the defendant 'was previously convicted of a felony.' " (*Buycks, supra*, at p. 889.) Because section 1170.18, subdivision (k) negates a necessary element for imposing the section

667.5(b) enhancement, Proposition 47 and the *Estrada* rule authorize striking that enhancement as to nonfinal judgments. (*Buycks, supra,* at p. 888.)

Here, defendant successfully took advantage of Proposition 47's procedure to mitigate his punishment before his judgment became final. The section 667.5(b) enhancement must be stricken.

D. Abstract of Judgment

Defendant correctly contends there are errors in the felony abstract of judgment. Counts one, two, and three are erroneously identified as serious felonies. In addition, the county jail term for count three (a misdemeanor) should not appear on the abstract. The abstract also incorrectly lists the term for count three as 364 months, when the term is 364 days. We shall direct the trial court to correct the abstract accordingly.

III. DISPOSITION

The one-year prior prison term enhancement is stricken. The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

MURRAY, J.